No. 20964

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TRANSMARINE NAVIGATION CORPORATION and Its Subsidiary, INTERNATIONAL TERMINALS, INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

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RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The facts must be set straight.

The Company operated a terminal in Wilmington, California, at Los Angeles Harbor, and had one Japanese ship line as its principal customer. During the summer of 1963, the Japanese Government ordered 60 Japanese ship lines, including the Company's customer, to merge into six great shipping companies. The Company's facilities, personnel and capital were totally inadequate and incapable of attracting or servicing any of the newly-merged large lines [TR pp. 192-194].

By August 1963, it was known the new lines were about to sign contracts with large West Coast marine operators. The Company faced financial ruin as it was to lose its principal customer which had been merged into a new line. Two other small companies, California Maritime Services and Jones Stevedoring Company, faced a similar crisis. These companies agreed with haste to liquidate their respective businesses and to reinvest their capital in a new enterprise to be called Sierra Harbor Terminals, which would operate a greatly expanded and diversified maritime business at modernized facilities in Long Beach and which, hopefully, would attract one of the new merged lines. Any delay in forming Sierra would have meant financial disaster [TR p. 194 lines 1-4]. A joint venture agreement was executed on September 5, 1963.

On November 1, 1963, when Sierra opened in Long Beach Harbor, the Company liquidated all its physical assets, terminated all its employees and reinvested its capital in the new enterprise. The Company, since then, has had no business, employees, property, or assets except for its minority interest in Sierra Harbor Terminals [TR 187 lines 13-25].

It is undisputed the Company took these steps as a result of dire and compelling economic necessity. There was no anti-union animus whatsoever. No one contends that there was any feasible alternative. The Company's decision was dictated solely by the Japanese and was completely beyond the control of the Company. The Company's decision was greeted with approval by most of its workers, many of whom were given employment by Sierra.

This litigation is concerned with approximately six security guards who formerly worked for the Company. They represented about one-tenth of the Company's work force and had their own union. They performed watchman duties at the Wilmington Terminal. The Company concedes that at no time before it signed the September 5, 1963 Agreement did it (the Company) bargain with the guard union concerning the wisdom of joining Sierra. The principal legal issue, as discussed later, is whether it was obligated to do so.

In order that the legal issue be placed in its proper context, it is necessary to correct certain serious errors of omission or commission in the Board's brief.

First, the Board states the Company refused to bargain about its decision to join Sierra. In fact, there is no evidence the Company ever refused to bargain or ever received an invitation to do so.* The evidence showed only that the Company did not seek out this union that represented one-tenth of its employees prior to signing the joint venture agreement and invite it to bargain about the wisdom or necessity of joining Sierra. On this basis the Board has found a "refusal" to bargain.

Second, the Board suggests the Union desired to bargain. The fact is, however, that the Union has never to this date asked to bargain about the decision to close the terminal or the effect thereof on the guards. Indeed, the Union has never replied to the Company's specific expressions of willingness to bargain. This is not a case where

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* The union business agent admitted no bargaining request was ever made (TR p. 55 lines 8-19).

the Company refused to bargain, but rather a case where the Union did not have any desire to bargain.

Third, the Board stated that the Union received only three days' advance notice of the Company's closing. The facts are, however, that the Company's closing was publicly announced on September 15 and the news was carried in all local newspapers and trade journals [TR p. 205 line 18, p. 706 line 15]. At about the same time, or shortly after, each of the guards was personally advised of the prospective closing [TR p. 137 lines 1-14]. The Board cannot pretend the Union was ignorant of a matter which was public knowledge and known personally to each of its members.

Fourth, the Board erroneously stated the Company decided that the security guard work at Sierra would be subcontracted. In fact, however, that decision was made by Sierra and not by the Company [TR p. 176 lines 9-23] and this decision was not incorporated in the joint venture agreement. It was made by Sierra some time after the agreement had been signed [Trial Examiner's Decis. p. 8 lines 35-8]. There is no evidence whether the Company agreed with or even participated in Sierra's decision.

Fifth, the Board urges it was possible the Company could have made arrangements for Sierra to hire the Company's guards. The fact is, however, that Sierra's facilities needed two guards at most and at times less than two. This is because Sierra's modern facilities in Long Beach were entirely enclosed as distinguished from the Company's former facilities at Wilmington, California [TR p. 225 lines 13-25]. In short, most of the Company's guards were not needed by Sierra and it does not stand to reason

the Company could have convinced Sierra to hire persons it did not need.

Sixth, the Board seeks to draw some sinister meaning from the fact that a Company memorandum of October 24 was distributed to most of the Company's employees but not to the guards or marine clerks [Exhibit 4]. The reason is that the memorandum contained the advice that Sierra would offer employment to certain of the employees who desired to work for Sierra. Since Sierra had not offered employment to the guards or marine clerks, there was no reason for the Company to distribute the memorandum to them as it did not concern them.

Seventh, the Board's brief ignores the evidence reflecting the Company's sympathetic attitude toward the guards. The Company gave each guard 4-6 weeks notice of his prospective termination so they could obtain other jobs [TR p. 137 lines 1-14]. The Company frequently inquired of the guards as to their success in lining up other employment and volunteered to assist them in any possible way. The Company offered to contact other guard employers and, on its own initiative, *obtained job offers* for all the displaced guards with the contractor who was to furnish guard services to Sierra [TR p. 173 lines 14-17]. Moreover, the Company wrote letters of recommendation for the individual guards to other prospective employers [TR p. 209 lines 3-8].

There is one final point in the Board's brief demanding correction and that deals with the Board's ruling. The Board held, in adopting the trial examiner's conclusion, that the Company "by entering into the agreement" with Jones Stevedoring Company and California Maritime

committed an unfair labor practice, i.e., refusal to bargain [Trial Examiner's Decis. p. 8 lines 42-6]. The Board did not hold, as its opening brief claims, that the Company, after making the decision, refused to bargain about the effect of that decision upon the guards.*

ARGUMENT OF THE CASE

I

THE BOARD ERRONEOUSLY CONCLUDED AS A MATTER OF LAW THE COMPANY WAS OBLIGATED TO BARGAIN WITH THE GUARD UNION BEFORE DECIDING TO TERMINATE ITS BUSINESS AND REINVEST ITS CAPITAL IN A NEW JOINT VENTURE.

The principal issue is clear: whether a company's decision, based solely upon greatly changed economic conditions, to terminate its business and reinvest its venture capital in a different enterprise is subject to mandatory bargaining. The Board asserts it is, and the Company urges it is not.

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* The Company wishes to make clear that it does not and never has denied the union's right to bargain about the effect of this decision, as contrasted to the decision, upon the guards. Indeed, the Company during these proceedings has repeatedly expressed its willingness to bargain on the effect and there is no reason why bargaining on this point cannot be as effective now as at any time in the past. In such proceedings the parties bargain about the effect of the decision on the displaced employees. Rights to termination pay, vacation pay, pension pay, are frequent subjects in such bargaining.

One must remember that the Company, in deciding to join Sierra, made very fundamental changes in the direction and operation of the Company and its capital, assets and personnel. These basic changes were made in the Company: (1) Ownership — the Wilmington operation was solely owned by the Company whereas ownership of Sierra's Long Beach operation is shared with two additional companies; (2) Control — The Wilmington operation was solely controlled by the Company, whereas Sierra's control is shared by three parties and the Company has only a minority voice; (3) Capital Structure — the Company in Wilmington had working capital of only $40,000, whereas Sierra has two and a half times that amount; (4) Employees — Sierra has three times the former employees of the Company and they work in many fields which did not exist in the Company, including longshoring, whereas the Company now has no employees of any description; (5) Nature of the Business — Sierra offers large terminal services, expert stevedoring and longshoring, whereas the Company offered a small terminal service; (6) Facilities — Sierra's are far larger, more modern and located at Long Beach Harbor, whereas the Company operated a small, outdated terminal in Wilmington at Los Angeles Harbor; (7) Customers — Sierra has a larger merged line which includes approximately ten times the size of the Company's former customers; and (8) Need for Guard Services — Sierra needs only two, whereas the Company, due to its poorly designed facility, required approximately six.

The Board asserts that a Company cannot make these basic changes in its operation for demanding economic reasons without first consulting and bargaining with a

Union.* The Board relies principally upon *Fibreboard Paper Products Corp. v. Labor Board,* 379 U.S. 203, 85 S.Ct. 398, 13 L.ed.2d 233, but a fair reading of the Court's opinion reveals that holding was limited to situations wherein an employer eliminates union members and brings in other workers employed by an independent contractor to do the same work under similar conditions of employment. The Court's opinion clearly did not hold that an employer must bargain with a Union before making fundamental changes in the Company's capital structure and entire operation. Indeed, the Court said at p. 213:

> "The facts of the present case illustrate the propriety of submitting the dispute to collective bargaining. *The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.* Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." [italics added]

At. p. 213:

> "We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type

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* A Union which represented less than a tenth of the Company's employees and had no control whatsoever over the economic necessity dictating such changes. The only function performed by these men was that of watchmen.

of 'contracting out' involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor under similar conditions of employment — is a statutory subject of collective bargaining under 8(d). *Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.*" [italics added]

In a separate concurring opinion, joined in by Mr. Justice Douglas and Mr. Justice Harlan, Mr. Justice Stewart elaborated at Page 218:

> *"The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving 'the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment' is subject to the duty to bargain collectively. Within the narrow limitations implicit in the specific facts of this case,* I agree with the Court's decision." [italics added]

Nor is the Board's position comforted by the other cases it cites, as the facts therein are clearly distinguishable. In *NLRB v. Northwestern Publishing Co.,* 343 F.2d 521, (7th Cir. 1965), and *NLRB v. American Manufacturing Co. of Texas,* 351 F.2d 74 (5th Cir. 1965), the employer eliminated workers because of anti-

union animus. In *NLRB v. Royal Oak Tool & Machine Co.,* 320 F.2d 77, (7th Cir. 1963), the company simply spun off its grinder divison and both corporations continued under the same ownership, control, capital structure, trade name and essentially unchanged in any material respect.

The Company invites the Court's attention to the following cases, each of which is factually closer to the case at bar, and each of which repudiates the Board's contentions. In *NLRB v. William J. Burns Int'l. Detective Agency, Inc.,* 346 F.2d 897 (8th Cir. 1965), the employer elected unilaterally for economic reasons to terminate its branch office in one city and discharged its security guards there. It continued its operations in other cities. The Eighth Circuit decision carefully reviewed *Fibreboard* and concluded that, unlike the *Fibreboard* situation, Burns was not continuing the same work at the same plant under similar conditions of employment and, accordingly, under *Fibreboard,* Burns had no obligation to bargain concerning the closing of its office. The Board's finding of a refusal to bargain and a back pay order were set aside.

In *NLRB v. Adams Dairy, Inc.,* 350 F.2d 108 (8th Cir. 1965), the employer decided unilaterally for economic reasons to terminate its driver-salesmen and assign their routes to independent contractors. The Eighth Circuit held that there was more involved than just the substitution of one set of employees for another, as in *Fibreboard.* Here, the employer sold its trucks and divested itself of control over the routes. The Court, accordingly, rejected the Board's contention that the com-

pany decision to alter its method of operation was a subject for mandatory bargaining. Instead, the Court held this decision was a management prerogative. Again, the Court reversed the Board's finding of a refusal to bargain and set aside its back pay order. The Supreme Court recently denied certiorari, 382 U.S. 1011.

The Third Circuit decided *NLRB v. Royal Plating and Polishing Co.,* 350 F.2d 191 (3rd Cir. 1965), wherein an employer unilaterally closed one of its two manufacturing plants for economic reasons. The Court observed that, unlike *Fibreboard,* this employer was making a major change in the economic direction of the company. The company had elected to withdraw its capital investment in the closed plant and recommit it elsewhere and this decision, the Court held, is clearly a management decision about which no bargaining is required. In remanding the case to the Board, the Court observed that since the Union had expressed no interest in bargaining about the effect of the closing, as distinguished from the decision to close (as in our case at bar), it was probable no remedial order was indicated.

A decision which predated *Fibreboard* but has been cited frequently since then and still represents good law is *NLRB v. Rapid Bindery, Inc.,* 293 F.2d 170 (2nd Cir. 1961), wherein the employer unilaterally closed its Dunkirk, New York, printing operation and moved it a short distance to a nearby city because its principal customer insisted it do so. The Board found an 8(a)(1) and 8(a)(5) violation for refusal to bargain with the Union about the decision to close the Dunkirk facility. The Second Circuit set aside the Board's finding and back

pay order, as the decision to close the plant "was clearly within the realm of managerial discretion". [Page 176]

Some common sense proves the justice of these recent decisions. Businessmen should have the freedom to manage their own businesses and to invest or withdraw their capital as economic circumstances dictate. To hold that a businessman must first bargain with each of the Union representing any of the employees before making a decision urgently dictated by economic conditions would "significantly abridge" his freedom, the very thing the Supreme Court in *Fibreboard* declared should not be done.

In summary, the Board's decision was based upon a misinterpretation of *Fibreboard,* as is clearly shown in the recent decisions of the Second, Third and Eighth Circuits. The Board's petition for enforcement of its order should be denied and its order set aside.

II

THE BOARD'S BACK PAY ORDER IS IMPROPER

If the Court rules, as the Company urges, that an employer has no duty to bargain about a decision to make a major change in the direction of his business, the back pay order should be set aside.

If the Court rules against the Company's contention, the order should *still* be set aside. This is because the Board found only two guards would have been used at Sierra in the event the Union's bargaining had been successful. Thus, two men at most have been deprived

of work they otherwise would have had. The Board concluded, however, that since no evidence had been heard as to which of the six guards would have been employed at Sierra, that it was "appropriate" the Company pay back wages to all six [Trial Examiner's Decis., pp. 9-10]. The most equitable solution would be to hear evidence in supplementary Board proceedings as to which two men would have been assigned the work. This is easily ascertainable as assignment of the work probably would be made on the basis of seniority. Indeed, the Board itself suggests supplementary proceedings to determine which men were employees [Brief p. 18].

CONCLUSION

The Board found the Company's decision to join Sierra was motivated entirely by urgent economic problems and not in any way by a desire to avoid contractual obligations with the Union [Trial Examiner's Decision, p. 9, lines 33-36]. No party has suggested the Company had any other alternative, and all must agree the economic circumstances were far beyond the control of the Company's watchmen. It would be a futile act to require the Company to bargain with the guards about the desirability of joining Sierra, where there was no other alternative and, especially, where the watchmen had no knowledge of the economic conditions demanding the change. The law has never required the doing of a futile act and it should not impose punishment upon the Company, in these circumstances, because it did not seek out the Union and invite bargaining about the wisdom of joining Sierra.

It would be an intolerable restraint on a businessman to require him to bargain with a watchman's Union in these circumstances about the advisability of making basic changes in the business. Not only would it be an invasion of management's prerogative, but it would cause delays in making managerial decisions that could have disastrous effects. Moreover, the capital is owned by the businessmen and it is only equitable that it should have the unfettered right to invest or reinvest it as economic conditions dictate.

Finally, it should be noted that the Board seeks in this case to apply a rule of law unknown in 1963 when these events took place. The Board has dilatorily handled this case during three succeeding years and now, on the basis of recent holdings, seeks to extract penalties, with interest, in the amount of $20,000. The probable effect of the Board's ruling would be to cause liquidation of the Company and throw Sierra's employees out of work. Clearly, the Board's order will not effectuate the purposes of the Board's Act.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Francis J. MacLaughlin